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No. 89-19

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MYRA HOLLADAY SIMS and FLORIDA IMPORT AND COMPLIANCE ASSOCIATION,

Cross-Petitioners,

vs.

STATE OF FLORIDA, DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, and CHARLES J. BRANTLEY, DIRECTOR DIVISION OF MOTOR VEHICLES,

Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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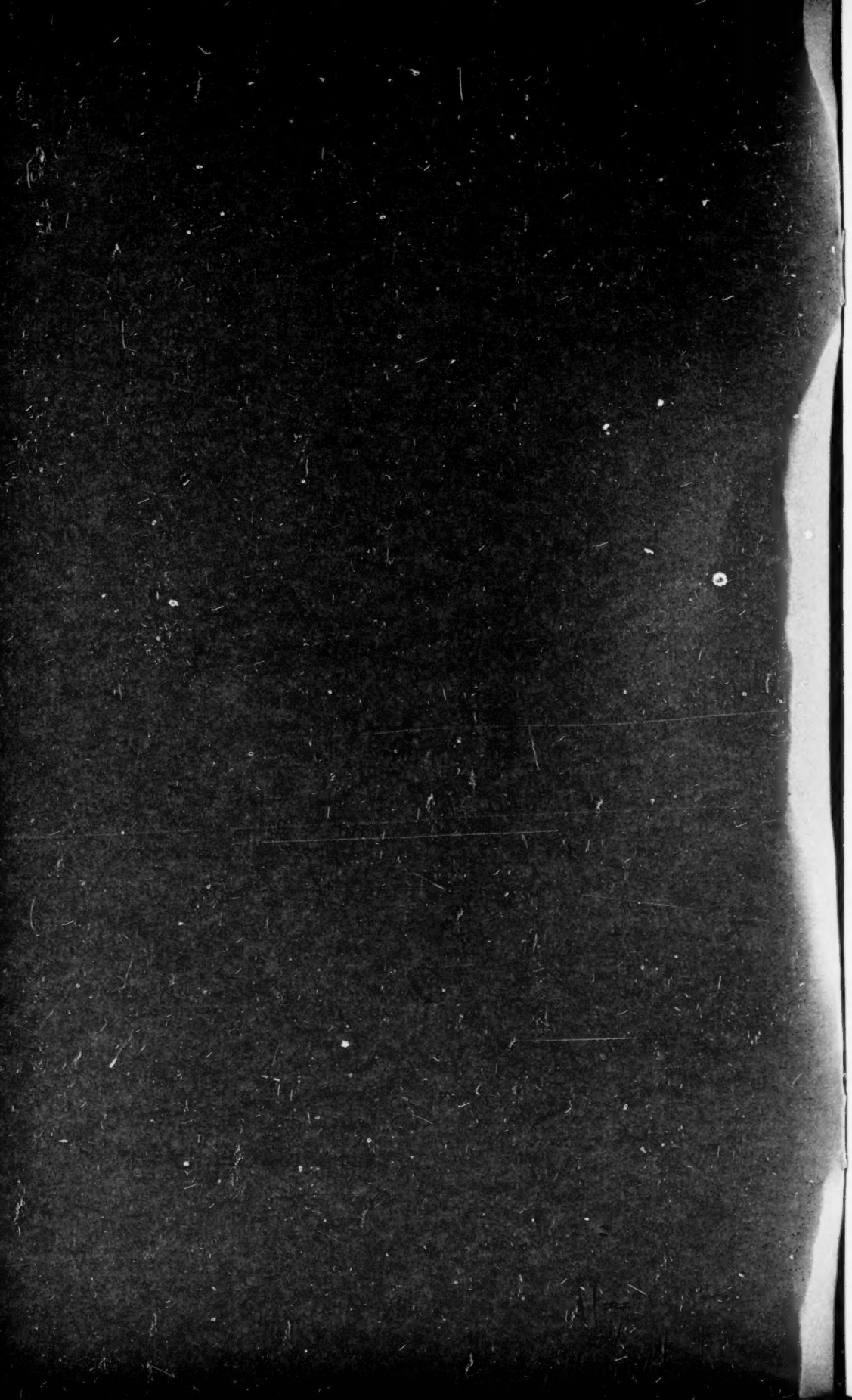

QUESTIONS PRESENTED

1. Whether Edleman v. Jordan, 415 U.S. 651 (1974) and Ford Motor Co. v. Department of the Treasury, 323 U.S. 459 (1945), foreclose the holding of the Court of Appeals that the State of Florida waived its Eleventh Amendment immunity simply because it did not raise the Eleventh Amendment until appeal and was represented by the State's Attorney General below? And, whether the Court of Appeals properly added, sua sponte, as a defendant, the Director of the Division of Motor Vehicles, Florida Department of Highway Safety and Motor Vehicles, in contravention of the Federal Rules of Civil Procedure, to avoid the Eleventh Amendment bar?

2. Whether the issue of attorney's fees was properly denied by the Court of Appeals or, in the alternative, whether the question was sufficiently ruled upon by the Court of Appeals below to allow this Court to review the denial of attorney's fees to the Cross-Petitioners.

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STATEMENT OF THE CASE

The Cross-Respondents do not accept the Cross-Petitioners' Statement of the Case. Cross-Respondents rely upon their Statement of the Case made in their Writ of Certiorari, Case No. 88-1950, repeated partially as follows.

Section 320.02(9), Florida Statutes (1985) requires that all vehicles not manufactured in accordance with the Federal Clean Air Act, 42 U.S.C. §7521 et seq., and the Motor Vehicle Safety Act, 15 U.S.C. §1381 et seq., must be in compliance with the two federal acts before the vehicles can be sold to consumers, titled or registered in Florida. Proof of this compliance is evidenced by a letter from the United States Customs Service (Customs) or letters from the United States Department of Transportation (DOT) and the United States Environmental Protection

Agency (EPA).

On April 30, 1985, Mrs. Sims purchased a used 1976 Mercedes Benz 450 SEL (Mercedes) from Ulrich Kiesewalter of Bonn, West Germany. The car was exported from Europe on April 6, 1985 and imported into the United States at Jacksonville, Florida, on April 30, 1985. The actual sale of the vehicle took place upon its arrival in Jacksonville.

Under federal law, a vehicle not manufactured in accordance with the Clean Air Act, 42 U.S.C. §7521 et seq., or the Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq., may not be imported into the United States. See, 42 U.S.C. §7522 and 15 U.S.C. §1397. Customs permits physical presence of vehicles not manufactured in accordance with the two laws into the country for the sole purpose of modification. However, until the two

federal laws are fully complied with, the vehicle is not "legally" within the United States for unrestricted use. Because of the two laws and Customs regulations, Mrs. Sims posted a Customs Bond and notified both EPA and DOT's National Highway Traffic Safety (NHTSA) of her importation of a non-conforming vehicle.

Mrs. Sims received a letter of exemption from EPA on June 3, 1985, stating that her car did not have to be converted or modified as long as she met EPA's stated requirements. Mrs. Sims received this letter because her vehicle fit into one of EPA's exemptions from physical modification.

On June 3, 1985, Mrs. Sims submitted her Safety Act conversion documentation to NHTSA. At that time, however, NHTSA lacked sufficient staff to quickly process the backlog of pending gray market vehicle

paperwork. In fact, at the time this lawsuit was instituted, in 1985, importers were waiting up to nine (9) months after submitting the paperwork to receive proof of compliance.

Mrs. Sims attempted to obtain Florida title and registration documents for her 1976 Mercedes Benz from the State of Florida. However, due to the NHTSA paperwork backlog, she was unable to produce the documents required by Florida law. Therefore, the Department refused to title or register her car until she could produce letters of compliance from both EPA and from NHTSA or Customs.

Cross-Petitioners' complaint was filed on July 25, 1985 in the United States District Court for the Northern District of Florida. Named in the complaint were the Cross-Respondent Florida Department of Highway Safety and Motor Vehicles and Jim

Smith in his official capacity as Attorney General of the State of Florida. However, only the Cross-Respondent Department was served with a summons and complaint. Counsel for Attorney General Smith questioned his being named in the suit at which point the Cross-Petitioners voluntarily dismissed Attorney General from the suit. No other individual state official was added to the suit at that time or any time later.

The complaint alleged that Section 320.02(9), Florida Statutes (1985), was unconstitutional because it violated the Supremacy and Commerce Clauses of the United States Constitution. The complaint sought declaratory and injunctive relief.

A final hearing/trial was held by the district court on September 12, 1985, and the court issued its Order and Final Judgment on December 30, 1985, finding that

Section 320.02(9) was unconstitutional as it was preempted by both federal acts. The case was appealed to the United States Court of Appeals for the Eleventh Circuit. Four days before oral argument was scheduled to be heard by the panel, at the end of September, 1986, Cross-Petitioners, for the first time, moved the Court of Appeals to amend their complaint to add a civil rights claim under 42 U.S.C. §1983 and also moved for attorneys' fees under 42 U.S.C. §1988.

Subsequent to oral argument, the panel, by letter of February 18, 1987, notified the parties that it wished further briefing on a list of questions prepared by the panel. Two of the five questions raised by the panel were whether the Eleventh Amendment barred the action then pending before the court and whether the Cross-Petitioners had standing to challenge the

Florida statute. The Department responded by asserting its Eleventh Amendment immunity, and that the Cross-Petitioners did not possess standing to challenge the Florida law.

The Eleventh Circuit panel, by a decision of 2-1, reversed in part and affirmed in part the final order of the district court and remanded the case for further proceedings consistent with its decision. Its decision was reported at 832 F.2d 1558 (11th Cir. 1987). In particular, it held that the case should be remanded to the district court to see if the Cross-Petitioners should be granted leave to amend their complaint, implicitly finding that the Department had waived its immunity (832 F.2d at 1570) and denied the Cross-Petitioners' motion for amendment of their complaint and for attorneys' fees (832 F.2d at 1563, fn. 6).

On December 21, 1987, the Cross-Respondent Department filed a Petition for Rehearing and Suggestion for Rehearing In Banc with the court. On March 1, 1988, the Court granted the Cross-Respondent Department's Petition and ordered a rehearing in banc. 840 F.2d 778 (11th Cir. 1988). The case was rebriefed on all the issues raised and decided before the panel. Cross-Petitioners again argued for attorneys' fees, this time in their in banc brief.

On January 11, 1989, the Court of Appeals issued its in banc opinion. Sims v. State of Florida, Department of Highway Safety and Motor Vehicles, 862 F.2d 1449 (11th Cir. 1989). The decision found that Section 320.02(9) was not preempted by the Safety Act but was preempted by the Clean Air Act. However, the court struck the entire law without making any attempt to

determine if the invalid portion of Section 320.02(9) could be severed from the remaining valid provision and upheld. In addition, the Court of Appeals determined the Eleventh Amendment was waived by the Department for a variety of reasons, including that it raised the immunity defense late in the proceedings and and there was a lack of prejudice to the state officials since the Florida Attorney General had represented the state throughout. Finally, the Court of Appeals denied all outstanding motions then pending, including Cross-Petitioners' motion for attorneys' fees.

On January 27, 1989, the Cross-Respondent moved for rehearing in banc asking the court to determine whether it was possible to sever the valid provisions of Section 320.02(9). The Court of Appeals denied the motion for rehearing on March 2,

1989. Cross-Respondents then filed in this Court their Petition for Writ of Certiorari. State of Florida, etc. v. Myra Holladay Sims, et al, Case No. 88-1095.

In addition, Cross-Respondents would make the following responses and additions to the Statement of the Case as set out by the Cross-Petitioners. While the former Attorney General of the State of Florida, Jim Smith, was "named" in the caption of the Cross-Petitioners' complaint, he was never served by the Cross-Petitioners. Counsel for Attorney General Smith informed the Cross-Petitioners, after receiving notice of the suit, that it was his intent to file a motion to dismiss him as a party as he was not a real party in interest. This was based not only on him not having primary authority to enforce Section 320.02(9), Florida Statutes, but also upon the Cross-Petitioners' assertion that

Attorney General Smith was being "joined as a party defendant in order that he may be heard, agreeably to §86.091, Florida Statutes (1983), and Rule 5(B) of the Court." Complaint, para. 5, pp. 4-5.

Therefore, Attorney General Smith was not being named to "neutralize" the Eleventh Amendment, but as a mere courtesy and a requirement under the local district court rules. But whatever was in the minds of the Cross-Petitioners, they never had the former Attorney General served with process and voluntarily dismissed him from the suit. Subsequent to that dismissal, Cross-Petitioners made no attempt to name or serve another official of the State of Florida who may have had jurisdiction over Section 320.02(9), Florida Statutes.

In addition, Cross-Petitioners' assertion in the statement of the case that the Attorney General appeared as a party

overlooks the fact that under Florida law, law that is binding in Eleventh Amendment cases, the Attorney General does not have either constitutional or statutory authority to waive the State's, or any of its agencies, Eleventh Amendment immunity. Consequently, the suit, after the dismissal of the Attorney General, was without any named state official.

The Statement of the Case of the Cross-Petitioners implies that their original complaint, filed in July, 1985, contained a claim brought under 42 U.S.C. §1983. However, this was not the case. The complaint sought relief under the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202 seeking a declaration that Section 320.02(9), Florida Statutes, was in violation of the Supremacy Clause as the Florida statute was preempted by the Clean Air Act and the Federal Highway Safety

Act. Complaint, p. 2-3. Jurisdiction was sought under 28 U.S.C. §1331, federal question jurisdiction. Complaint, p. 2.

At no place in the complaint was relief sought under the Civil Rights Act, 42 U.S.C. §1983, no allegation of a violation of anyone's civil rights nor a request for attorney's fees under 42 U.S.C. §1988.

On September 25, 1986, four days before the scheduled oral argument before the three judge panel of the Eleventh Circuit, Cross-Petitoners mailed their motion to amend their complaint and a request for attorneys fees. The panel, at oral argument, permitted the Cross-Respondents time in which to respond to the Cross-Petitioners' motion. Cross-Respondents responded by asserting a number of grounds in which to deny the Cross-Petitioners' motion. The panel denied this motion. 832 F.2d 1558, 1563, fn. 6.

The Cross-Petitioners again moved in their answer brief to the in banc Court for attoirney's fees. Cross-Respondents were not permitted a response to the Cross-Petitioners' in banc answer brief. Contrary to Cross-Petitioners' assertion in their Statement of the Case, p. 15, Cross-Respondents did not consent to any unplead claim, equal protection or other claim, being tried before the district court. The only issue tried was the one presented, preemption. In addition, there has never been a ruling that the Cross-Petitioners possessed any "right, privilege, or immunity" under the Clean Air Act or that they prevailed in vindicating any "civil right." Because of the Court of Appeals decision, no one is sure why the Court of Appeals denied the Cross-Petitioners' request for attorney's fees.

REASONS FOR GRANTING THE FIRST QUESTION OF THE CROSS-PETITION

While the Cross-Respondents agree with the Cross-Petitioners that the Eleventh Amendment question should be accepted by this Court, the Cross-Respondents disagree with the Cross-Petitioners characterization of the question and their reasons for accepting jurisdiction in this case.

THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BARS FEDERAL COURT JURISDICTION IN THIS CASE.

This case was initially filed by the Cross-Petitioners against the State, its Department of Highway Safety and Motor Vehicles, and the State's Attorney General. Shortly after the commencement of this action the Cross-Petitioners dismissed the Attorney General from the suit and at the time of trial and decision of the district court and ever since, no

individual state official was a named party to the action. The Court of Appeals ruled that the Cross-Respondents waived their immunity under the Eleventh Amendment for the reason that it would be an abuse of discretion if, on remand, the district court should deny a motion to add as a defendant a named official. 862 F.2 at 1460.

The court found this waiver because the Cross-Respondents had not raised the immunity defense at trial or initially on appeal and that the State was not prejudiced by the lack of a named official because the Florida Attorney General, while having been dismissed from the suit by the Cross-Petitioners, represented the State's interest throughout the case. Id., at 1460 and n. 16. To avoid the Eleventh Amendment bar, the Court of Appeals added Mr. Charles J. Brantley, Director of the Division of

Motor Vehicles and announced that the Eleventh Amendment had been satisfied.

The issues raised by the in banc decision are of great importance to the States. Not only does the in banc decision conflict with all decisions of this Court but it also directly conflicts with a decision of the Sixth Circuit Court of Appeals involving nearly identical facts and the same issues.

The decision below is in direct conflict with this Court's decisions on when the Eleventh Amendment immunity defense may be raised and how the immunity defense is to be resolved when it is raised for the first time on appeal. The decision also recognizes an unprecedented form of waiver (no prejudice because a state or one of its agencies is represented by the state's attorney general) and a new remedy to correct the failure to properly name a

state official (sua sponte naming the head of the state agency involved). The naming of a state official at the appellate level also runs afoul of the Due Process Clause as the state official is denied any opportunity to be heard. See, 862 F.2d 1469, Tjoflat, J., dissenting.

There is no question that, as a general rule, a state or one of its agencies, cannot be sued in federal court without its consent. Welch v. State Department of Highways, ____ U.S. ____, 107 S.Ct. 2941 (1987); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 100 (1984); Dugan v. Rank, 372 U.S. 609 (1963); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). This is a jurisdictional bar which applies regardless of the nature of the relief sought. Papisan v. Allain, 478 U.S. 265 (1986); Pennhurst, 465 U.S., at 100; Cory v. White, 457 U.S. 85 (1982)

(injunctive relief). And, important for this case, the Eleventh Amendment may be raised at any time, Edelman v. Jordan, 415 U.S. 651 (1974), including for the first time on appeal. Ford Motor Co., supra.

While a state may consent to suit in federal court, Pennhurst, 465 U.S., at 99; Clark v. Barnard, 108 U.S. 436, 447 (1883), the state's consent must be unequivocal; Pennhurst, 465 U.S., at 99; Edelman v. Jordan, 415 U.S. at 673. A waiver of the state's immunity must be explicitly authorized by the state in its constitution or laws. Palmer v. Ohio, 248 U.S. 32, 43 (1918). Only the state itself may decide when and where to waive its immunity. Pennhurst, 465 U.S., at 99. In addition, a state may not be sued for injunctive relief, Cory v. White, supra. In order to acquire injunctive relief, an individual state offical must be named. Ex Parte

Young, 209 U.S. 123 (1908).

The State of Florida has not waived its Eleventh Amendment immunity. The sovereign immunity of Florida can only be waived by the Florida Legislature. Article X, Section 13, Florida Constitution; Tuveson v. Florida Governor's Council on Indian Affairs, Inc., 734 F.2d 730, 734 (11th Cir. 1984); Manatee County v. Town of Longboat Key, 356 So.2d 143, 147 (Fla. 1978). Furthermore, the Eleventh Circuit has ruled in other cases that the Florida Legislature had not legislatively waived the State's immunity in federal court. See, Fincher v. State of Florida Department of Labor, 798 F.2d 1371, 1372 (11th Cir. 1986); Gamble v. Florida Department of Health and Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986). The Florida Legislature has expressly reserved the State's, and its agencies', Eleventh Amendment immunity.

Section 768.28(16), Florida Statutes (1987). The Legislature has not authorized the Florida Attorney General to waive Florida's immunity in any case in which he may appear on behalf of the State or one of its agencies. Therefore, Florida's Eleventh Amendment immunity could not be and was not waived by the appearance of the Attorney General defending this action below.

The Court of Appeals ruled that the State waived its Eleventh Amendment immunity because it did not raise the defense at trial or initially upon appeal. Such a ruling negates the holdings of this Court that the Eleventh Amendment "need not be raised in the trial court", Edelman v. Jordan, 415 U.S. at 678, and that the Eleventh Amendment immunity can even be raised for the first time on appeal, Ford Motor Co., 323 U.S. at 466-

467. In both cases, the immunity defense was not raised at trial.

In Ford Motor Co., the State of Indiana did not assert its Eleventh Amendment immunity until the case reached this Court. Ford Motor Company argued that Indiana had thus waived its Eleventh Amendment immunity defense. This Court rejected that argument saying:

> the objection to petitioner's suit as a violation of the Eleventh Amendment was first made and argued by Indiana in this Court. This was in time, however. The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court.

Ford Motor Co., 323 U.S. at 466-67. This Court reaffirmed that holding in Edelman v. Jordan, supra. There the Illinois officials failed at the district court to raise the immunity defense after being

sued. The Court reaffirmed that the Eleventh Amendment defense could be raised for the first time either on appeal before a circuit court or before this Court. Id., 415 U.S. at 677-78.

The decision of the Court of Appeals below is also in direct conflict with a decison of the Sixth Circuit Court of Appeals on the same issue of waiver. In the case of Estate of Ritter v. University of Michigan, 851 F.2d 846 (6th Cir. 1988), the Sixth Circuit was faced with a factual situation nearly identical to that presented here. The University of Michigan Board of Regents was sued in the Michigan Court of Claims. No individual officials of the Board were named in the action. Id., 851 F.2d at 849. The Board removed the case to federal district court and defended the case on the merits, failing to assert its Eleventh Amendment immunity.

Id. The district court granted summary judgment for the Board on the merits and the plaintiff appealed. Id. at 848. The case was briefed and argued on its merits before the appellate court. Id. At oral argument, the Court of Appeals, raised the question of the Board's Eleventh Amendment immunity. Id. Counsel were requested to file supplemental briefs on the issue and the Board's counsel responded by asserting the Eleventh Amendment immunity defense. Id. The plaintiff responded by asserting the Board had waived the immunity defense by removing the case and not raising the immunity defense earlier. Id. The Court of Appeals rejected the plaintiff's arguments. Relying on the decisions of this Court in Ford Motor Co. and Edelman v. Jordan, it ruled that the Board had not waived its immunity as the Eleventh Amendment defense could be raised at any

time. Id. at 851. The court also ruled that a state's appearance and defense on the merits was no bar to the immunity defense. Id. at 852. This case factually is no different than Ritter.

In this case, Court of Appeals also ruled that the Cross-Respondents could not assert the Eleventh Amendment immunity defense, finding that the State and its officials were not prejudiced because the Florida Attorney General represented the Cross-Respondents throughout the proceeding. Neither this Court, nor any other court, has ever ruled that "lack of prejudice to the state or its officials" was a proper ground for disregarding the express provisions of the Eleventh Amendment.

As this ruling is without precedent, this Court's review is imperative because nearly all states use their attorneys

general, or other state employed attorneys, to defend actions against the state and its agencies. If such a ruling were allowed to stand, every time an attorney general appeared, defended on the merits and failed to raise the immunity issue at trial, he would waive it for that state, thereby negating the holdings of this Court. See, Edelman v. Jordan, 415 U.S. at 677-78. See also, Estate of Ritter v. University of Michigan, 851 F.2d at 852.

The Court of Appeal's attempt to circumvent the Eleventh Amendment by the sua sponte addition of a state official runs counter to the the Federal Rules of Civil Procedure. The action of the Court of Appeals contravenes Rule 21 on the addition of parties and Rule 43 on the substitution of parties. There is no precedent for the action of the Court of Appeals to correct the failure of the Cross-Petitioners to

retain or substitute the proper party.

Finally, the decision below denies the state official added by the in banc court, Cross-Respondent Charles J. Brantley, his constitutional right to due process of law. See, 862 F.2d 1469, Tjoflat, J., dissenting. The newly named official would not be served with the complaint in the case; would not have a right to assert any defenses he may have to the issues in the case; and may likely be saddled with a legal position advanced by the state attorney general that he may disagree with. This lack of basic due process has never been condoned by this Court and has never been a consequence of asserting a state's Eleventh Amendment immunity.

For these many reasons, this Court should take jurisdiction of this case and decide whether a state's Eleventh Amendment immunity is waived when not raised until

appeal or where the court finds a "lack of prejudice"; whether the sua sponte addition of an individual at the appellate level is constitutionally permissible and in accordance with federal rules of procedure; and the rights of a state official to due process when he was not a party to the action in the trial court. The Cross-Respondents request that this Court reverse the judgment of the Court of Appeals and order the case remanded to the district court and dismissed.

REASONS FOR DENYING THE SECOND QUESTION OF THE CROSS-PETITION

A. NO CLAIM UNDER 42 U.S.C. §1983 WAS ALLEGED BY THE CROSS-PETITIONERS IN THE COMPLAINT BEFORE THE DISTRICT COURT

When originally filed in July, 1985, the Cross-Petitioners' complaint only sought declaratory relief, seeking a declaration that Section 320.02(9), Florida Statutes, was in conflict with the Supremacy Clause of the United States Constitution because of the presence of the Motor Vehicle Safety Act, 15 U.S.C. §1381, et seq. and the Clean Air Act, 42 U.S.C. §7521, et seq. The Complaint contained no allegations of any violation of the Cross-Petitioners' civil rights.

Consequently, the Cross-Respondents did not address or rebut any evidence that may have sounded like evidence for a civil rights claim. They specifically did not

consent to any such issues being raised or tried before the district court. Specifically, they would have argued that the Supremacy Clause nor the Commerce Clause create any "right, privilege or immunity" that is protectable by the Constitution or federal law. See, e.g., Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).

Subsequent to the decision of the district court on December 30, 1985, the Cross-Petitioners did not move for an award of attorney's fees under 42 U.S.C. §1988 or any other legal theory.

B. THE COURT OF APPEALS PROPERLY DENIED THE CROSS-PETITIONERS' MOTION FOR ATTORNEYS' FEES OR, IN THE ALTERNATIVE, DID NOT SET OUT IN ITS DECISION ANY REASONING FOR ITS DENIAL OF CROSS-PETITIONERS' MOTION FOR ATTORNEYS' FEES THAT WOULD PERMIT THIS COURT TO DETERMINE WHETHER THE DENIAL OF THE MOTION WAS LEGALLY SUPPORTABLE.

Shortly after the district court rendered its decision, the Cross-Respondent Department of Highway Safety filed its notice of appeal. The case was forwarded to the Court of Appeals in early 1986 and thoroughly briefed by both parties. After oral argument was set for the last week of September, 1986, and just four days before oral argument was to be held, the Cross-Petitioners, for the first time, moved to amend their district court complaint with a civil rights claim and requested attorney's fees.

Counsel for the Cross-Petitioners addressed this motion to the court of appeals at oral argument. Because of the short notice, counsel for the Cross-Respondent was unprepared to address the issues raised in the motion. The court of appeals allowed Cross-Respondent's counsel time in which to respond to the motion. Cross-Respondent responded by asserting that the attempted amendment of the complaint at that late of date (after close of the trial, final judgment, notice of appeal, briefing and just before oral argument) was against all weight of law as the requested amendment was not timely; resulted in prejudice to the opposing party; and was bad faith on the part of the moving party. See, Foman v. Davis, 371 U.S. 178, 182 (1962).

In addition, the Cross-Respondent asserted that neither the Supremacy Clause

or the Commerce Clause would support an award of attorney's fees as neither Clause concerns individual rights necessary for protection. See, White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1987); J&J Anderson, Inc. v. Town of Erie, 767 F.2d 1469 (10th Cir. 1985); Gould, Inc. v.Wisconsin Dept. of Industry, Labor and Human Relations, 750 F.2d 608 (7th Cir. 1984); Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir. 1984). The court of appeals denied the Cross-Petitioners' motions without comment.

First, the Court of Appeals was correct in denying the Cross-Petitioners' motion for attorneys' fees. As the Supremacy Clause does not create any right, privilege or immunity within the meaning of 42 U.S.C. §1983, Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 615 (1979), Pirolo v. City of Clearwater, 711 F.2d

1006, 1010-1011 (11th Cir. 1983), a final court order based upon the Supremacy Clause does not give rise to an award of attorney's fees, White Mountain Apache Tribe v. Williams, 810 F.2d 844 (9th Cir. 1987); Gould, Inc. v. Wisconsin Dept. of Industry, Labor and Human Relations, 750 F.2d 608 (7th Cir. 1984). The decision of the Eleventh Circuit is consistent with decisions of the other circuits. Therefore, there is no legal or practical reason this Court needs to accept jurisdiction to decide the attorney's fees question.

In the alternative, the decison of the Court of Appeals is not in proper form for consideration by this Court. Without a specific finding by the Court of Appeals as to which of the many possible grounds presented to the court by the Cross-Respondent for denial, we have no way of

knowing upon which ground the Court of Appeals decided. Without knowing the specific reason the court denied the Cross-Petitioners' motion, it would be pure speculation as to what this Court would address on the merits or what question was to be resolved.

If this Court believes the issue of awarding of attorney's fees to the Cross-Petitioners needs to be addressed, then it would be best for the Court to remand the case to the Eleventh Circuit Court of Appeals to give that court the opportunity to cleary state its reasoning in writing for denying the Cross-Petitioners' motion for attorneys' fees. At this point, it is premature to address the attorney's fees question on the merits.

CONCLUSION

For the reasons set out, this Court should grant that part of the Cross-Petition For Writ of Certiorari seeking review of the Eleventh Amendment question.

However, the Court should deny that part of the Cross-Petition seeking review of the attorneys' fees question as Cross-Petitioners did not timely present a potential claim for relief when they had the opportunity to do so or that the Court of Appeals was correct in its decision to deny a motion for attorney's fees. In the alternative, the Court has not been presented with a decision from the court of appeals that would allow it to decide the attorney's fees question on the merits and the case should be remanded to the Court of Appeals for clarification.

Dated: August _____, 1989.

Respectfully submitted

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